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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**

15 DEMETRIC DI-AZ, OWEN DIAZ AND
LAMAR PATTERSON

16 Plaintiffs,

17 v.

18 TESLA, INC. DBA TESLA MOTORS,
19 INC., CITISTAFF SOLUTIONS, INC.;
WEST VALLEY STAFFING GROUP;
20 CHARTWELL STAFFING SERVICES,
INC.; NEXTSOURCE, INC.; and
21 DOES 1-10, inclusive

22 Defendants.

Case No. 3:17-cv-06748-WHO

**DEFENDANT TESLA, INC.'S NOTICE OF
MOTION AND MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF ITS
MOTION TO RETAIN CONFIDENTIALITY
OF DOCUMENTS PURSUANT TO
PROTECTIVE ORDER**

[Filed concurrently with the Declaration of Reanne Swafford-Harris, Declaration of Brandon Ward and [Proposed] Order]

Date: January 8, 2020
Time: 2:00 p.m.
Courtroom: 2, 17th Floor
Judge: Hon. William H. Orrick

Complaint Filed: October 16, 2017
Trial Date: March 2, 2020

1 PLEASE TAKE NOTICE that on January 8, 2020, at 2:00 p.m., or as soon thereafter as
2 this matter may be heard, in Courtroom 2 of the above-entitled Court, Defendant Tesla, Inc.
3 (“Tesla”) will and hereby does move this Court to retain the confidential treatment of its
4 documents produced in discovery.

5
6 Dated: November 18, 2019

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

7
8 By: /s/ Reanne Swafford-Harris

9 TRACEY A. KENNEDY
10 PATRICIA M. JENG
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1 **I. INTRODUCTION**

2 Pursuant to Civil L.R. 7-4 and Paragraph 6.3 of the Stipulation and Protective Order, Dkt.
3 50 (“Protective Order”), Defendant Tesla, Inc. (“Tesla”) hereby moves to maintain the
4 confidential treatment of its documents produced in discovery, to date. Tesla’s confidential
5 designations were properly applied pursuant to the Protective Order. Discovery is closed and
6 Plaintiffs Owen Diaz and Demetric Di-Az (“Plaintiffs”) have no need to disclose any confidential
7 documents for the purposes of litigating this case, except at trial. However, when Tesla offered to
8 meet and confer on the use of protected confidential material at trial because, per the Protective
9 Order, “Protected Material at trial shall be governed by a separate agreement or order,” Plaintiffs
10 refused. Plaintiffs’ intent to disclose these documents outside this litigation is driven by an
11 improper purpose, and their challenges to these designations are frivolous. Accordingly, Tesla has
12 no choice but to bring this motion.

13 In this litigation, Plaintiffs are alleging that they were individually subjected to retaliation
14 and discrimination due to their race while employed by Tesla. Plaintiffs nonetheless seek public
15 disclosure of Tesla’s private documents containing the confidential personnel information of
16 Tesla’s employees, *i.e.*, nonparties to these proceedings who have a constitutional right to privacy,
17 and as the employer, Tesla is affirmatively obligated to protect. Plaintiffs’ notice challenging the
18 designations of Tesla’s production contain conclusory accusations rather than particularized bases,
19 as required by the Protective Order. The asserted basis for Plaintiffs’ purported need to remove
20 the protections of this Court’s Order from these documents is wholly insufficient to overcome the
21 constitutional privacy rights of Tesla’s employees and other non-parties, or otherwise outweigh
22 Tesla’s particularized need to maintain the confidentiality of its employment policies. As such,
23 Tesla requests that the Court uphold their “CONFIDENTIAL” designations.

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1 **II. ARGUMENT**

2 **A. Plaintiffs Challenge Is Frivolous As The Parties Are Informed That The Use**
3 **Of Confidential Documents At Trial Will Be Governed By A Separate**
4 **Agreement**

5 Plaintiffs' counsel lodged their challenges to Tesla's designations well after the discovery
6 cutoff date in this litigation¹. In an effort to avoid unnecessary law and motion and with the
7 sincere desire to resolve this issue, Tesla's counsel accordingly met and conferred with Plaintiffs'
8 counsel on October 30, 2019, and also inquired why Plaintiffs' counsel would challenge its
9 designations at this advanced stage in the litigation.² Declaration of Reanne Swafford-Harris in
10 Support of Motion to Retain Confidentiality ("Swafford-Harris Decl."), ¶ 2. Discovery closed on
11 October 30, 2019. The discovery motion deadline was also closed. By the time this motion is
12 heard, Plaintiffs would have also already filed their Opposition to all of the parties' motions for
13 summary judgment or partial summary judgment, and had filed one of them. *Id.*, ¶ 2. Counsel for
14 Plaintiffs stated that he wished to use confidential documents at trial, but Tesla referred Plaintiffs'
15 counsel to Section 3 of the Protective Order, which provides that "[a]ny use of Protected Material
16 at trial shall be governed by a separate agreement or order." *See e.g.* Swafford-Harris Decl., ¶ 3,
17 Exh. B. Since there would be a separate order governing Protected Material at trial, Tesla offered
18 to meet and confer on that separate agreement or order. *Id.*, ¶ 3. Plaintiffs refused, clearly
19 indicating they intend to disclose protected material outside this litigation in an attempt to harass
20 and unnecessarily burden Tesla. *Id.* Per the Protective Order, "[f]rivolous challenges, and those
21 made for an improper purpose (*e.g.* to harass or impose unnecessary expenses and burden on other
22 parties)," are not permitted. Section, 6.3 Protective Order.

23 Indeed, Plaintiffs' counsel intends to circumvent a separate protective order with Tesla in
24 an arbitration, *Dewitt Lambert v. Tesla, Inc. dba Tesla Motors, Inc.*, filed in California Superior
25 Court, Case No. RG17854515; JAMS Ref. No. RG18927296, ("*Lambert*"), which required that

26 ¹ The Court's July 17, 2019 Civil Pretrial Order provides a fact discovery cutoff date of October 11, 2019.

27 *See* Dkt. 78; *see also* Swafford-Harris Decl., ¶ 2, Exh. A.

28 ² Tesla informed Plaintiffs during their meet and confer conference, that they would agree to de-designate
some of the challenged documents. *See e.g.* Swafford-Harris Decl., ¶ 4.

1 the plaintiff and their counsel (*i.e.* Plaintiffs’ counsel here) destroy any documents after the
2 conclusion of arbitration. Instead, Plaintiffs’ counsel issued a subpoena on their own office to
3 obtain the confidential documents, which were supposed to be destroyed, in order to use them
4 outside of the *Lambert* litigation (which the protective order prohibited). Swafford-Harris Decl., ¶
5 5. This Court previously issued an order prohibiting Plaintiffs’ counsel from seeking to bypass the
6 procedural protections to which their client agreed in *Lambert*; and that “[i]nformation designated
7 as “Confidential” in *Lambert* shall not be disclosed . . .” *See* Dkt. 80. *See also* Swafford-Harris
8 Decl., ¶ 3, Exh. C. Plaintiff’s counsel also attempted to circumvent the *Lambert* protective order
9 in a third case, *Marcus Vaughn v. Tesla, Inc. dba Tesla Motors, Inc.*, filed in California Superior
10 Court, Case No. RG17882082, by subpoenaing their own office in *that* case as well, seeking to
11 have disclosed confidential documents that should have been destroyed. *Id.*, ¶ 6. The Court there
12 indicated that subpoenaing oneself was not the route for Plaintiffs’ counsel to take in order to
13 obtain the documents sought. *Id.* Similar to prior improper means Plaintiffs’ counsel pursued to
14 circumvent the protections guaranteed to Tesla per the parties’ protective order, here there is also
15 no valid purpose for Plaintiffs to challenge Tesla’s designations.

16 **B. Good Cause Exists to Retain the Confidentiality of Tesla’s Designated**
17 **Documents**

18 There is good cause to retain confidentiality of Tesla’s designated documents because
19 Tesla has a particular need for protection of the documents in dispute. Fed. R. Civ. P. 26(c).
20 When the confidentiality of information produced under a protective order is challenged, the court
21 should consider “[w]hether particularized harm will result from disclosure of information to the
22 public.” *Shelley v. Cty. of San Joaquin*, No. 2:13-CV-0266 MCE DAD, 2015 WL 2082370, at *2
23 (E.D. Cal. May 4, 2015). It must then “balance ‘the public and private interests to decide whether
24 [maintaining] a protective order is necessary.’” *Id.* The Ninth Circuit has “directed courts doing
25 this balancing to consider the factors identified by the Third Circuit in *Glenmede Trust Co. v.*
26 *Thompson*, 56 F.3d 476, 483 (3d Cir.1995)).” *Id.* In *Glenmede Trust*, the Third Circuit recognized
27 several factors that a district court may consider in determining whether “good cause” exists to
28 continue the protection of the discovery material produced pursuant to a stipulated protective

1 order, including whether disclosure will violate any privacy interests and whether the information
2 is being sought for a legitimate purpose or for an improper purpose [. . .]. Tesla’s Motion is made
3 on the grounds that its documents produced contain: (1) information that Tesla contains its
4 proprietary and confidential business practices; (2) information that Tesla properly marked
5 “CONFIDENTIAL” pursuant to the Protective Order and (3) the private and confidential
6 personnel information of nonparties which, if disclosed, would result in the violation of their
7 constitutional rights—an irreparable harm.³

8 Under the Protective Order, information or materials designated as “CONFIDENTIAL”
9 may involve:

10 Valuable research, development, commercial, financial, technical, personnel,
11 human resources, and/or proprietary information for which special protection from
12 public disclosure and from use for any purpose other than prosecution of this action
13 is warranted. Such confidential and proprietary material and information consist
14 of, among other things, proprietary and/or confidential business practices, financial
15 information, **information regarding confidential business practices**, or other
16 confidential, development, or commercial information (**including information**
17 **implicating privacy rights of third parties, including, but not limited to,**
18 **employees), information otherwise generally unavailable to the public**, or
19 which may be privileged or otherwise protected from disclosure under state or
20 federal statutes, court rules, case decisions, or common law. Section 1, Protective
21 Order. (emphasis added).

22 Tesla properly designated all nonparty communications pertaining to nonparty personnel
23 information, investigative, and/or disciplinary conduct, and personnel documents as
24 “CONFIDENTIAL.” California employees’ contact information and personnel records are

25 ³ Swafford-Harris Decl., ¶ 7, Exh. D, Tesla’s Production Chart of Challenged Documents, containing each
26 disputed designation, its document type and its confidential nature; See *e.g.* Line Nos. 1; 4-8; 31-32; 43-
27 50; and 54-55 (confidential employment policies and business practices); *see also* Line Nos. 11; 14-19; 30;
28 51-52; and 56-58 (private and confidential personnel information of nonparties).

1 protected by the right to privacy. Cal. Const., art. I, § 1; *Cook v. Yellow Freight System, Inc.*, 132
2 F.R.D. 548, 551 (E.D. Cal. 1990) (“[B]oth federal and state courts have specifically held that
3 individuals have a privacy interest in not having their names and addresses disclosed.”). “[T]he
4 initiation of a law suit does not, by itself, grant plaintiffs the right to rummage unnecessarily and
5 unchecked through the private affairs of anyone they choose. A balance must be struck.” *Id.* This
6 balance extends to the inherent right to privacy over confidential information contained in
7 personnel files. *See Dep’t of Air Force v. Rose*, 425 U.S. 352, 372, 96 S. Ct. 1592, 1604, 48 L. Ed.
8 2d 11 (1976) (Congressional concern for the protection of the kind of confidential personal data
9 usually included in a personnel file is abundantly clear). Tesla also considers the disciplinary
10 information of its employees confidential. Ward Decl., ¶ 5.

11 The documents sought to be protected here contain confidential information regarding pay
12 records, HR investigations, and performance and personnel/disciplinary issues of nonparty
13 employees. *See e.g.* Swafford-Harris Decl., ¶ 7, Exh. D⁴. These are exactly the types of private
14 personnel records intended to be protected by California’s Constitution. Further, Plaintiffs’
15 challenge to de-designate such personnel records and publicly disclose nonparty personnel
16 investigations would undermine the integrity with which Tesla conducts its employee
17 investigations. Declaration of Brandon Ward in Support of Motion to Retain Confidentiality
18 (“Ward Decl.”), ¶ 5. Tesla strives to maintain confidentiality throughout its complaint
19 investigation process to the extent it is able; and such public disclosure may have a chilling effect
20 on employees from coming forward with their concerns. *Id.*

21 Tesla’s employment policies were properly designated “CONFIDENTIAL” because they
22 contain confidential business practice information, the dissemination of which is controlled by
23 Tesla. Ward Decl., ¶ 3. Tesla does not publish its policies nor distribute them but makes them

24
25 ⁴ *See e.g.* Line No. 16: TESLA0000511, Email communications between nonparties regarding the
26 discipline of a nonparty associate; Line No. 9: TESLA0000140-142, Email communications between
27 Tesla’s Employee Relations team regarding the investigation of a nonparty employee; *see also* Line 10:
28 TESLA000054-55, Email communications regarding discipline of nonparty employee and their lost
earnings.

1 accessible to its current employees through intranet. *Id.*, ¶ 4. Additionally, Tesla takes
2 appropriate measures to ensure the challenged policies are not publicly disclosed by its employees
3 by restricting their means of access, *e.g.* they are not printed for distribution. *Id.*, ¶ 3. Thus,
4 Tesla's employment policies are also confidential because they contain information that is
5 generally unavailable to the public. *See* Section 1, Protective Order (Exh. B).

6 Further, given the past and persistent conduct of Plaintiffs' counsel with respect to Tesla
7 discovery, Tesla has serious concerns about the dissemination of its employment policies and
8 communications produced in this matter, being used to not only further the litigation Plaintiffs'
9 counsel is pursuing against Tesla in other matters; but being disclosed publicly, resulting in an
10 unfair trial. As noted above, Plaintiffs' counsel is litigating several cases against Tesla and
11 attempted to circumvent other protective orders through various methods, including propounding
12 discovery in one matter seeking confidential documents that were produced pursuant to protective
13 orders in other matters (that were required to be destroyed). Here, in particular, Plaintiffs do not
14 have any valid purpose for disclosing the protected materials, since Plaintiffs made clear that the
15 challenge would not be simply for use at trial (which would be governed by separate order), and
16 all other discovery and dispositive motion briefing deadlines have passed.

17 As such, the public disclosure of internal communications regarding among other things,
18 employee pay practices, disciplinary and personnel issues, and employee relations investigations,
19 should be precluded. Tesla's personnel, investigative, disciplinary, and policy documents were
20 properly designated "CONFIDENTIAL" pursuant to the Protective Order, and the confidential
21 information contained in these documents should remain protected.

22 **C. Plaintiffs' Notices Contain Conclusory Accusations as the Basis for Their**
23 **Belief That Tesla's Confidentiality Designations Were Not Proper**

24 Plaintiffs served three separate letters to Tesla dated October 16, 2019, October 19, 2019
25 and October 22, 2019, Plaintiffs Challenge to Confidential Designations (the "Notice").
26 Swafford-Harris Decl., ¶ 2; 4, Exh. E-G. In the Notice, Plaintiffs appear to challenge the entirety
27 of Tesla's production designated "Confidential," on the basis that "they are merely routine
28 business documents not privileged." *Id.*, ¶ 4, Exh. E. Section 6.2 of the Protective Order however

1 requires the challenging party to explain the basis for its belief that the confidentiality designation
2 was not proper. Making conclusory accusations that a document cannot maintain its
3 confidentiality because it is a business record, without more, is not a sufficient challenge.

4 Contrary to the Protective Order, the Notice merely concludes generally, with no basis in
5 fact or evidence, that Tesla's internal documents and policies were provided to its employees and
6 therefore not treated as confidential by Tesla. *Id.* at Exh. G.

7 Plaintiffs' assertions are inaccurate and belied by the facts. Tesla indeed treats the
8 designated employment policies, including its Anti-Handbook Handbook as confidential and takes
9 measures to prevent their external distribution. Ward Decl., ¶ 3. Tesla's policies are "not
10 published." *Id.*, ¶ 4. In fact, the designated policies are available to its employees only through
11 their intranet or a multi-step verification process. *Id.* Tesla does not have a business practice of
12 distributing, in hard copy, their employment policies to employees. *Id.*, ¶ 3. Tesla requires its
13 employees to review their policies online and acknowledge they have done so via an electronic
14 signature. *Id.*, ¶ 4.

15 Thus, the purpose for Plaintiffs challenge is not only improper, but wholly insufficient.

16 **III. CONCLUSION**

17 For the foregoing reasons, Tesla respectfully requests the Court retain the confidentiality of
18 Tesla's document production.

19
20 Dated: November 18, 2019

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

21
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